b. In this case, moreover, the Binational Panel decision in *Softwood Lumber* creates the functional equivalent of a circuit split. Contrary to respondents' claims, a Binational Panel does not "replace" the CIT or operate as a U.S. district court. U.S. Opp. at 20. Under the North American Free Trade Agreement ("NAFTA"), Panel review "replace[s] *judicial review*," Art. 1904(1), 32 I.L.M. 612, 683 (1993) (emphasis added), and Panel decisions, unlike those of the CIT or district courts, are not subject to appellate review, except in narrow situations not relevant here. 19 U.S.C. § 1516a(g)(2)-(4). Moreover, NAFTA and its implementing statute do not state that Panels are "bound" by Federal Circuit decisions, but only that they may "*rely on*" "relevant . . . judicial precedents to the extent that a court . . . would." NAFTA, Art. 1904(2), 32 I.L.M. at 683 (emphasis added).[9] This provision treats Panels like circuit courts, which may "rely on," but are not bound by, precedent from other circuits.

The importance of the conflict between the Panel and Federal Circuit decisions is not lessened by the non-precedential nature of Panel decisions or petitioners' ineligibility for Panel review. U.S. Opp. at 19-20. What matters is that a statute has been given different meanings in two different proceedings.[10] Respondents make much of the Panel's observation that the Section 3538 implementation process had run its course in that case but not this one, *id.* at 21; US Steel Opp. at 16, but they nowhere explain how the meaning of "dumping margin" can depend on whether the U.S. has implemented a WTO report. That statute either permits zeroing (because courts can ignore *Charming Betsy* and Congress's desire for full compli-

[9] The fact that several Panels have deemed themselves bound, US Steel Opp. at 14-15, is irrelevant. NAFTA says no such thing, and individual Panel decisions do not bind other Panels. *See* U.S. Opp. at 19-20.

[10] Contrary to the government's claim, U.S. Opp. at 21 n.9, the Panel categorically ruled that, under the *Charming Betsy* canon, zeroing is "not in accordance with law." Pet. App. 120a. The Department's use of a different type of zeroing on remand in that case simply highlights its intransigence, not any qualification in the Panel's ruling.

ance with the AD Agreement) or it does not (because *Charming Betsy* and congressional intent bar the practice).

Moreover, petitioners have shown that the Federal Circuit has foreclosed use of the *Charming Betsy* canon, regardless of whether implementation has occurred. First, the court ruled that the statute's specification of factors to be weighed in assessing dumping margins prohibits use of the canon, Pet. at 17-18.[11] Second, implementation decisions will not address how duties already imposed under Agreement-violating dumping orders should be treated. Because the treatment of such previously-imposed duties raises the same "foreign policy implications" that, according to the lower court, bar use of the *Charming Betsy* canon, implementation decisions will not remove that bar. *Id.* at 19.

Finally, the Binational Panel decision in *Softwood Lumber* cogently explained the logical fallacy in the Federal Circuit's conclusion that authoritative interpretations of the AD Agreement cannot be used when determining the validity of an agency's interpretation of an ambiguous statute under *Charming Betsy*. *Id.* at 16-17; EC Br. at 12-14. Respondents offer no response to the Panel's analysis, because there is none. The purposes of "percolation"—of allowing further consideration of issues by lower tribunals—have now been fully served. The Panel decision has exposed the deep flaws in the Federal Circuit's reasoning, and no other lower court can address the validity of zeroing under U.S. law.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[11] This analysis, moreover, squarely conflicts with the D.C. Circuit's reasoning in *George E. Warren Corp.* v. *U.S. EPA*, 159 F.3d 616 (D.C. Cir. 1998), *amended on other grounds by* 164 F.3d 676 (D.C. Cir. 199). *See* Pet. at 23.

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APPENDIX

APPENDIX A

UNITED STATES – SECTION 129(c)(1) OF THE URUGUAY ROUND AGREEMENTS ACT

(WT/DS221)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

March 8, 2002

* * * *

Canada Has Failed to Establish that Section 129(c)(1) of the URAA Mandates a Breach of U.S. Obligations Under the AD Agreement, the SCM Agreement, or GATT 1994

* * * *

B. The Meaning of Section 129(c)(1) Is a Factual Question That Must Be Answered by Applying U.S. Principles of Statutory Interpretation

10. The United States has argued at length in its first written submission, in its oral statement at the first Panel meeting, and in its answers to the Panel's questions, that section 129(c)(1) does not breach WTO rules because "prospective" implementation in WTO disputes involving anti-dumping and countervailing duty measures requires a Member to ensure that the new determination applies to all merchandise that enters for consumption on or after the date of implementation. However, even if Canada were correct in arguing that date of entry is not the controlling issue, section 129(c)(1) can violate WTO rules only if it *mandates* the actions that Canada alleges. If it does not do so, then Canada's claims must fail, regardless of what it means to implement a new determination in a WTO-consistent manner.

11. It is well-established that municipal law consists not only of the provisions being examined, but also domestic

legal principles that govern the interpretation of those provisions.[8] While the Panel is not bound to accept the interpretation presented by the United States, the United States believes that the Panel should give considerable deference to the United States' views on the meaning of its own law.[9]

12. For purposes of ascertaining the meaning of section 129(c)(1) as a matter of U.S. law, U.S. courts and agencies must recognize the longstanding and elementary principle of U.S. statutory construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). While international obligations cannot override inconsistent requirements of domestic law, "ambiguous statutory provisions . . . [should] be construed, where possible, to be consistent with international obligations of the United States."[10]

C. Canada's Arguments Fail to Establish that Section 129(c)(1) Mandates Action Inconsistent with WTO Rules

13. Canada makes a number of arguments regarding why section 129(c)(1) allegedly breaches various provisions of the AD Agreement, the SCM Agreement, and GATT 1994. Each of the arguments is a variant on a common theme, and each arises from a common assumption. To quote Canada's response to a question from the Panel:

> The language of section 129(c)(1), by limiting compliance to future entries, has the effect of precluding the

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[8] *See, e.g.*, Panel Report on *United States – Section 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, para. 7.108 & n. 681 ("*U.S. 301*").

[9] *U.S. 301*, para. 7.19.

[10] *Restatement (Third) of the Foreign Relations Law of the United States*, § 114 (1987) (Exhibit U.S.–11); and *U.S. 301*, note 681, in which the panel recognized the existence of what is known in the United States as "the *Charming Betsy* doctrine".

> Department of Commerce from taking action to comply with the DSB ruling with respect to prior unliquidated entries. As Canada understands U.S. law, section 129(c)(1) would be interpreted this way because otherwise the express limitation to future entries contained in that section would be meaningless. The language of section 129(c)(1) precludes the Department of Commerce from applying the determination to prior unliquidated entries.
>
> Since Section 129(c)(1) directs the Department to apply a new WTO-consistent determination to all unliquidated entries entered on or after a particular date, section 129(c)(1) precludes the Department of Commerce from applying the new determination to unliquidated duties made prior to the particular date. That is, the use of the word "after" in section 129(c)(1) excludes any interpretation that would allow the Department of Commerce to apply the new determination to prior entries. Thus, by virtue of U.S. statutory interpretation and administrative law principles, the Department is precluded from applying the new determination to prior unliquidated entries.[11]

14. Canada's assumption, however, is not correct. Canada's error arises from a mistaken interpretation of the term "determination" as that term is used in section 129(c)(1). As the United States explains below, when the term is properly understood, it becomes clear that Canada's claims and arguments do not establish that section 129(c)(1) mandates WTO-inconsistent action.

15. Section 129(c)(1) states in its entirety:

> (c) *Effects of Determinations; Notice of Implementation.*—
>
> (1) *Effects of determinations.*—Determinations concerning title VII of the Tariff Act of 1930 that are imple-

---

[11] Canada's Responses to Questions, paras. 48, 49.

mented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act) that are entered, or withdrawn from warehouse, for consumption on or after—

(A) in the case of a determination by the Commission under subsection (a)(4), the date on which the Trade Representative directs the administering authority under subsection (a)(6) to revoke an order pursuant to that determination, and

(B) in the case of a determination by the administering authority under subsection (b)(2), the date on which the Trade Representative directs the administering authority under subsection (b)(4) to implement that determination.

16. As the text demonstrates, the scope of section 129(c)(1) is actually quite limited. It only addresses the treatment of entries that take place on or after the date of implementation, and even then, it only addresses the application of the *particular determination issued under the authority of section 129(c)(1)* to those entries. It does not address what actions Commerce may or may not take in a *separate* determination in a *separate* segment of the proceeding (*i.e.*, any separate review of the order), and thus does not mandate that Commerce take (or preclude Commerce from taking) any particular action in any separate segment of the proceeding.[12]

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[12] Section 351.102 of Commerce's regulations defines a segment of a proceeding as follows:

(1) *In general.* An antidumping or countervailing duty proceeding consists of one or more *segments*. "Segment of a proceeding" or "segment of the proceeding" refers to a portion of the proceeding that is reviewable under section 516A of the Act.

(2) *Examples.* An antidumping or countervailing duty investigation or a review of an order or suspended investigation, or a scope inquiry under § 351.225, each would constitute a segment of a proceeding.

17. As the United States discussed in response to question 46 from the Panel, this point can be illustrated by considering the case of a challenge to a Commerce Department final dumping determination in an investigation. If the challenge were successful, Commerce would make the necessary changes in its methodologies and issue a new, WTO-consistent determination.[13] It would then apply that new determination by setting a new cash deposit rate, which would apply to all entries that took place on or after the implementation date. It is this new determination that is the "determination" referenced in section 129(c)(1).

18. If a company were then to request an administrative review of what Canada terms "prior unliquidated entries," Commerce would conduct the administrative review and issue a new determination. Since the administrative review determination would not be the "determination implemented under section 129(c)(1)," nothing in section 129(c)(1) would preclude Commerce from applying its new, WTO-consistent

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[13] Section 129(c)(1) does not preclude USTR from directing implementation prior to the end of the reasonable period of time, and it does not preclude Commerce from implementing within the reasonable period of time. In both applications of section 129(c)(1) to date, USTR has directed implementation, and Commerce has implemented, before the end of the reasonable period of time. *See United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, Status Report by the United States*, WT/DS99/6, 17 January 2000, paras. 4, 8, 10 (explaining that USTR issued its request in the *DRAMS* case on August 2, 1999, that Commerce issued its new determination on November 4, 1999, and that the reasonable period of time expired on November 19, 1999) (Exhibit US-12); *see also* Exhibit US-9 (explaining that USTR issued its request in the *Stainless Steel* case on April 18, 2001 and that Commerce issued its new determination on August 28, 2001); *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, Agreement Under Article 21.3(b) of the DSU*, WT/DS179/5, 1 May 2001 (explaining that the reasonable period of time in the *Stainless Steel* case expired on September 1, 2001) (Exhibit US-13).

methodologies in the administrative review.[14] Canada is simply wrong to claim that section 129(c)(1) would preclude Commerce from doing so.

19. The second scenario that Canada has raised is a situation where the WTO challenge results in the revocation of an antidumping or countervailing duty order because the new, WTO-consistent determination results in a finding of no injury, no dumping, or no subsidization. Under the terms of section 129(c)(1), the revocation would apply to all entries which took place on or after the date of revocation of the order, so Commerce would instruct the U.S. Customs Service to stop requiring cash deposits as of that date. In any subsequent administrative review, Commerce would need to decide what to do with respect to entries that took place prior to the date of revocation.

20. Canada has not challenged an actual application of section 129(c)(1) in such a scenario, and Commerce has not addressed such a scenario to date. The only impact of section 129(c)(1), however, is that Commerce would not determine the fate of those pre-implementation entries *in the revocation determination itself.* Section 129(c)(1) does not require Commerce to apply duties to those entries,[15] it does not limit Commerce's discretion in deciding how to administer the law

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[14] As Canada argued in the first Panel meeting:

> [t]he law applied [in an administrative review] is the law as interpreted by the Department of Commerce *at the time that it makes its administrative review decision. The Department of Commerce's interpretation may be quite different from the interpretation it originally applied in the original investigation or in previous administrative reviews.* Examples are instances in which a U.S. court has held that the Department of Commerce's interpretation of the law is incorrect or where the Department of Commerce has decided that a different interpretation of the law is more appropriate.

See Canada's Oral Statement at the first Panel meeting, para. 11 (emphasis added).

[15] Even the SAA states only that the entries "would remain subject to potential duty liability." SAA at 1026.

in separate segments of the proceeding with respect to those entries, it does not limit judicial review of the results of those separate proceedings, and it does not limit Commerce's obligation to implement the results of any such judicial proceedings.[16] Accordingly, section 129(c)(1) does not mandate a breach of any of the provisions of the AD Agreement, the SCM Agreement, or GATT 1994 that Canada cites.

21. Since section 129(c)(1) does not mandate any particular treatment of what Canada terms "prior unliquidated entries" in any determination other than the particular one that is issued under its terms, section 129(c)(1) could *mandate* a breach of WTO rules only if the AD Agreement, the SCM Agreement, or GATT 1994 contained an affirmative obligation for Members to ensure that any implementation of adverse DSB recommendations and rulings applied to both pre- and post-implementation entries. None of the Agreements contains such an obligation; none of the Agreements even addresses what constitutes proper implementation in WTO disputes. The only agreement that *does* address a Member's implementation obligations is the DSU, and Canada has declined to pursue any DSU claims. Under the DSU, a Member's implementation obligations are prospective only.[17]

* * * *

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[16] In response to the Panel's questions, Canada admitted that section 129(c)(1) would *not* violate WTO rules if Commerce "change[d] its interpretation of U.S. law for other reasons, notably as a result of a direction from a U.S. court." *See* Canada's Responses to Questions, para. 54. It also admitted that section 129(c)(1) "would not prevent a U.S. court from directing the Department of Commerce to change the basis on which it made definitive determinations . . . ." *See id.*, para. 51.

[17] The United States discusses below why, contrary to Canada's repeated assertions, it is in fact seeking through this dispute to establish a right of retroactive relief in cases involving antidumping and countervailing measures.

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No. 05-364

In the Supreme Court of the United States

CORUS STAAL BV AND
CORUS STEEL USA INC.,

Petitioners,

v.

DEPARTMENT OF COMMERCE, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE EUROPEAN COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae, the European Commission ("Commission"), is the executive and administrative body of the European Community ("Community"), which at present comprises 25 Member States. As the "guardian" of the treaty establishing the European Community, the Commission is charged with developing and enforcing Community-wide legislation spanning a broad range of subject matters, including foreign trade. The Commission is also responsible for representing the Community before the European, Member State, and foreign courts, putting forward its view of Community law, including the international agreements concluded by the Community. Art. 211 EC Treaty (consol. version), 2002 OJ, C 325/33, at 119-120. Furthermore, the EC Treaty lays down the Community's common commercial policy in Article 133, including anti-dumping matters. Art. 133 EC Treaty (consol. version), 2002 OJ, C 325/33, at 90-91. According to longstanding case law of the European Court of Justice, the common commercial policy is the exclusive competence of the Community. Opinion 1/75, 1975 ECR 1355.

The Commission has a strong interest in having this Court grant certiorari in this case, in light of the potentially wide-ranging negative repercussions of the Federal Circuit's decision. The court below affirmed a U.S. Department of Commerce ("Department") practice, zeroing, that results in an unequal playing field between foreign trading partners. In so holding, the Federal Circuit adopted an approach that, in the view of the

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Under Rule 37.6 of the Rules of this Court, the *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation and submission of this brief.

Commission, dangerously understates the role of the judiciary in interpreting ambiguous domestic law to be consistent with international treaty obligations. If the Federal Circuit's decision stands, its acceptance of zeroing and its dismissive approach toward international obligations could pose a threat to relations between the United States and other countries, as well as create disparate approaches in countries governed by a single treaty.

STATEMENT

A. The Underlying Facts

This case is about a practice known as "zeroing," a methodology that has repeatedly and expressly been found to be inconsistent with international law.[2] In the United States, the Tariff Act of 1930 is the statutory framework under which antidumping duties are imposed on foreign merchandise. Duties are applied whenever the foreign merchandise is being "dumped" in the United States, meaning that the merchandise "is being, or is likely to be, sold in the United States at less than its fair value," resulting in "material injury" to a U.S. industry. 19 U.S.C. § 1673.

In determining antidumping duties, the Department calculates an intermediate "dumping margin," which is the amount by which the price at which merchandise is sold in the exporter's home market ("normal value") exceeds the price at which merchandise is sold in the United States ("export price"). 19 U.S.C. §§ 1677b(a), 1677(35)(A). The Department then calculates a

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[2] Although we will refer simply to "zeroing" in this brief, there is a technical distinction – irrelevant to this case but relevant elsewhere – between the type of zeroing used by the Department in this case (so-called "model zeroing") and other forms of zeroing. The type of zeroing at issue in this case and in all of the reports of multinational bodies referred to in the certiorari petition is model zeroing. The European Community itself once applied model zeroing, but it has abandoned that practice entirely following the *Bed Linen* report partially reproduced at Pet. App. 136a-149a.

"weighted average dumping margin," which is the percentage determined by dividing the aggregate of the intermediate dumping margins for a specific exporter by the aggregate export prices and constructed export prices for that exporter. *Id.* § 1677(35)(B). Where the aggregate of the export prices is *lower* than the normal value of the merchandise, a *positive* weighted average dumping margin is determined, and antidumping duties are imposed on this basis.

The Department engaged in zeroing when calculating dumping margins for Corus Staal, a Dutch manufacturer of steel and other products. Several of Corus Staal's U.S. export sales involved prices *higher* than normal value, as opposed to prices *lower* than the normal value, generating an intermediate *negative* "dumping margin." Rather than calculate the aggregated weighted average dumping margin using in full all comparable export prices – that is, all intermediate dumping margins, both positive and negative – the Department selected only the positive intermediate dumping margins, effectively assigning a value of *zero* to all negative intermediate dumping margins. The result is an artificially inflated weighted average dumping margin, one that does not take into account the actual, higher export prices. Indeed, the inherent bias created by zeroing may generate dumping margins where none would have otherwise existed. See Pet. 8.

B. The Decisions of the Courts Below

Petitioner challenged the Department's zeroing methodology as an unreasonable interpretation of the applicable U.S. statute, 19 U.S.C. § 1677b(a). Petitioner contended that the terms used in that statute must be given meaning by reference to the international agreement they were designed to implement, the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade* ("Antidumping Agreement" or "Agreement").[3] The Antidumping Agreement is part of the

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[3] Marrakesh Agreement Establishing the WTO, Annex 1A (Apr. 15,

Uruguay Round Agreements that established the World Trade Organization ("WTO").

Petitioner did not seek to invalidate 19 U.S.C. § 1677b(a) or any other U.S. statute. Furthermore, petitioner did not seek to give binding effect through the U.S. courts to any determination of an international body interpreting the Antidumping Agreement.[4] Rather, petitioner advanced the modest position that in *interpreting* 19 U.S.C. § 1677b(a) – and in deciding whether the agency's interpretation of that statute is a *reasonable* one passing muster under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984) – courts should reject as unreasonable (so that it fails *Chevron* deference) an interpretation of an ambiguous U.S. statute if the interpretation creates a violation of the WTO Antidumping Agreement and an alternative interpretation would not. Petitioner invoked the *Charming Betsy* canon of statutory interpretation, which states that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

The Court of International Trade applied *Chevron*'s two-step framework, first considering whether Congress had spoken to the precise question at issue and second considering whether the agency's interpretation was a reasonable resolution of statutory ambiguity. At step one, the court firmly rejected the Department's position that the statute *mandates* zeroing. Pet. App. 22a-24a. The court next addressed petitioner's argument

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1994), *reprinted in* 1 H.R. Doc. 103-316 (1994).

[4] Under Article 17.14 of the WTO's Dispute Settlement Understanding (see http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm), once the Dispute Settlement Body adopts Panel and Appellate Body reports – that is, once such reports are unconditionally accepted by the parties to the dispute – they are binding in international law.

that "Commerce's zeroing methodology is unreasonable because it violates the WTO Antidumping Agreement," *id.* at 25a.

The Court of International Trade expressed skepticism about zeroing. "The court is * * * wary of a methodology that intentionally minimizes the impact of nondumped transactions by manipulating the data of potentially equalizing sales." Pet. App. 27a. Disagreeing with the reports adopted by the WTO Dispute Settlement Body, the court perceived "technical[]" and "minimal[]" compliance with the literal words of the Agreement, however. *Ibid.* (emphasis omitted). The court next considered the decision of the WTO Appellate Body in the *Bed Linen* case, Pet. App. 136a-149a, which confirmed that zeroing violates the Antidumping Agreement. Although "[t]his case is * * * similar to *Bed Linen*," Pet. App. 28a, the court "conclude[d] that it cannot solely rely upon a non-binding interpretation of an international agreement as grounds to strike a United States agency interpretation of a statute," Pet. App. 29a-30a, and should "defer to Commerce's interpretation," *id.* at 30a.

The Federal Circuit affirmed. Although petitioner's argument was that the *Charming Betsy* doctrine required the court to reject as *unreasonable* (at *Chevron* step two) an interpretation of an *ambiguous* statute if the interpretation violates a *treaty*, the court of appeals characterized petitioner's argument as being that "Commerce's zeroing methodology violates the United States' obligation to interpret section 1677(35) to conform to *[WTO] decisions* prohibiting zeroing." Pet. App. 4a-5a (emphasis added). As so recharacterized, the argument was easy to reject, because "Commerce is not obligated to incorporate WTO procedures into its interpretation of U.S. law." Pet. App. 5a.

The court of appeals cited Section 102(a) of the URAA, 19 U.S.C. § 3512(a), for the proposition that the Antidumping Agreement may not "trump[] domestic legislation." Pet. App. 8a-9a. "If U.S. statutory provisions are inconsistent with GATT or an enabling agreement, it is strictly a matter for Con-

gress." *Id.* at 9a. Proceeding as if petitioner had asked it to invalidate *an Act of Congress* – and not an agency interpretation of an ambiguous statute – the court therefore "accorded no deference to the cited WTO cases" and explicitly "reject[ed]" the *Bed Linen* decision. *Ibid.* The court also acknowledged the WTO Appellate Body's *Softwood Lumber* decision, *id.* at 121a-135a, which had applied to the *U.S.* practice of zeroing the same reasoning used in *Bed Linen* to invalidate the *EC* practice of zeroing. But the court of appeals "reject[ed] *Softwood Lumber* as nonbinding because the finding therein was not adopted [by the Executive Branch] as per Congress's statutory scheme." *Id.* at 9a.[5]

At no point did the court of appeals explicitly consider whether the decisions in *Bed Linen* and *Softwood Lumber* were, though nonbinding on U.S. courts, *persuasive* evidence that zeroing as practiced by the Department is inconsistent with the Antidumping Agreement, so as to render that interpretation of an ambiguous statute unreasonable under *Chevron* step two as informed by application of the *Charming Betsy* doctrine. Instead, the court held that ensuring compliance with the Antidumping Agreement was *entirely* the responsibility of the political branches, with no role for the judiciary. "We will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme." Pet. App. 10a.

SUMMARY OF ARGUMENT

The European Community and the United States are parties to the same WTO Agreements. Yet in the United States zeroing

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[5] The statutory scheme to which the court referred was the process in Sections 123 and 129 of the Uruguay Round Agreements Act, 19 U.S.C. §§ 3533 and 3538, for *implementation* of the decisions of WTO reports.

is permissible under the decision below, while it is impermissible in Europe. This anomalous situation in and of itself supports a grant of certiorari.

U.S. law itself is thrown into a state of uncertainty by the decision below. The NAFTA Binational Panel that decided the *Softwood Lumber* case (Pet. App. 96a-120a) and the Federal Circuit each looked at the same doctrines of U.S. law – the *Chevron* doctrine, the *Charming Betsy* doctrine, and the provisions of the URAA that preclude direct effect of the Antidumping Agreement and leave implementation of WTO Appellate Body reports to the political branches. They reached opposite conclusions about whether a tribunal should (in general) consider WTO Appellate Body reports in deciding whether an agency's interpretation of a statute is reasonable despite creating the possibility of a treaty violation. They reached opposite conclusions about whether a tribunal should (in particular) invalidate the Department's interpretation of an ambiguous statute to permit zeroing. Not only does this conflict create undesirable confusion – which only this Court can clear up – about U.S. law, but also it strikes the European Commission that the Binational Panel's reasoning is more faithful to this Court's decisions. In particular, in *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg & Constr. Trades Council*, 485 U.S. 567, 575 (1988), this Court applied the *Charming Betsy* canon to invalidate an agency interpretation otherwise worthy of *Chevron* deference.

The European Court of Justice has applied to WTO Agreements doctrines analogous to the U.S. doctrines at issue here, and has reached the opposite conclusion from the Federal Circuit. "Consistent interpretation" – a European doctrine analogous to the *Charming Betsy* doctrine – has been applied to bring the interpretation of ambiguous national legislation into line with international obligations under the WTO Agreements, even though the European Court of Justice has ruled that in the Community, as in the United States, those agreements may not be given direct effect. The divergence in approach between Euro-